INDEX

	Page
The Opinion Below	1
Question Presented	2
Statement	2
The Parties	2
(a) Respondent's Organization and Method of Operation	2
(b) Petitioner's Organization and Plan of Operation	4
The Adoption of the Rules After Department of Justice Clearance	9
The Jury Instructions and Verdict	13
The Injunction Decision	17
The Decision of the Court of Appeals	17
Reasons For Denying The Writ	19
1. There is no question of general importance; only the limited issue of the proper jury instructions on the evidence in this particular case	19
2. There is no conflict with decisions of this Court	21
3. There is no conflict of Circuits	24
4. There are no circumstances warranting this Court's interlocutory consideration of the case, contrary to its usual practice	25
Conclusion	26
Appendix	1a

LIST OF CITATIONS

CASES:

Allers v. *Bohmker*, 199 F. 2d 790 (7th Cir. 1952)	18
American Construction Company v. *Jacksonville T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893)	25
Beacon Theatres, Inc. v. *Westover*, 359 U.S. 500 (1959)	19

Page

Board of Trade of the City of Chicago v. *United States*, 246 U.S. 231, 238 (1918) 15, 20

Fashion Originators' Guild v. *Federal Trade Commission*, 312 U.S. 457 (1941) 23

Florists' Nationwide Telephone Delivery Network—America's Phone-Order Florists, Inc., v. *Florists' Telegraph Delivery Association*, 371 F. 2d 263, 267-71 (7th Cir. 1967) 1, 14, 18, 19, 20, 22, 24

F.T.C. v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 753, (1945) 24

F.T.C. v. *Dilger*, 276 F. 2d 739, 744 (7th Cir. 1960); cert. denied 364 U.S. 882 (1960) 2a

Gillespie v. *United States Steel Corp.*, 379 U.S. 148, 153 (1964) 25

Hamilton-Brown Shoe Co. v. *Wolf Brothers & Co.*, 240 U.S. 251, 257-58 (1916) 25

Kiefer-Stewart Co. v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951), rehearing denied 340 U.S. 939 (1951) 21, 22, 23, 24

Moore v. *Mead Service Co.*, 340 U.S. 944 (1951), on remand 190 F. 2d 540 (10th Cir. 1951), cert. denied 342 U.S. 902 (1952) 23, 24

Times-Picayune Publishing Company v. *United States*, 345 U.S. 594, 623 (1953) 20, 25

Union Leader Corporation v. *Newspapers of New England, Inc.*, 284 F. 2d 582, 586, 587 (1st Cir. 1960), cert. denied 365 U.S. 833 (1961), rehearing denied 365 U.S. 890 (1961) 24, 25

United States v. *General Motors Corporation*, 323 U.S. 373 (1945) 26

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MISCELLANEOUS:

Profile of the Retail Florist Industry 1964, U. S. Department of Agriculture, Economic Research Service, Report No. 741 3

Petition for a Writ of Certiorari, *Union Leader Corporation* v. *Newspapers of New England, Inc.*, (No. 658, 1960 Term) 25

RECORD REFERENCES

The following abbreviations are used in this brief.

Petition for a writ of certiorari ..... Pet.

Petitioner's printed appendix Vols. I, II, III ..... P I, P II, P III

Respondent's printed appendix .....RA

Respondent's supplemental appendix incorporated in its reply brief below .....DSA

Respondent's exhibits .....RX

Petitioner's original brief in Court of Appeals .....POB

Petitioner's answer brief in Court of Appeals .....PAB

Respondent's original brief in Court of Appeals ....ROB

Respondent's answer brief in Court of Appeals .....RAB

Petitioner's exhibits .....PX

Trial transcript .....Tr.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1132

FLORISTS' NATIONWIDE TELEPHONE DELIVERY NETWORK—AMERICA'S PHONE-ORDER FLORISTS, INC., A Corporation, *Petitioner*,

v.

FLORISTS' TELEGRAPH DELIVERY ASSOCIATION, A Corporation, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

THE OPINION BELOW

The opinion of the Court of Appeals is now reported and appears at 371 F. 2d 263.

QUESTION PRESENTED

This case concerns the legality of two rules adopted by respondent, a non-profit membership corporation comprised of retail florists and engaged in processing their intercity, "flowers-by-wire" orders. The rules prescribed anti-boycott and honest advertising standards of conduct for respondent's members—requiring them to refrain from boycotting other members and from falsely advertising that they offered an exclusive flowers-by-wire service. The Antitrust Division of the Department of Justice twice cleared the rules—both before and after they were promulgated.

The only question is whether the Court of Appeals correctly held that the lower court committed prejudicial error in failing and refusing to instruct the jury concerning the defense theory that evidence concerning the background of the rules could be considered in deciding whether they were lawful under the applicable "rule of reason" criterion of the Sherman Act.

STATEMENT

The Parties: (a) Respondent's Organization and Method of Operation. Respondent FTD was organized in 1910 as a voluntary association and later became a non-profit membership corporation (Pet. 3).[1] It has about 10,500 member-owners in all significant communities of the United States (P II 402). Membership is freely granted without exclusive territorial restrictions. For example, FTD has 160 members in Chicago; 162 in New York and 49 in Milwaukee (P I 63).

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[1] Pet. refers to Petition. The legend to other record reference abbreviations is contained in the section of the Index entitled "Record References", pp. iii, *supra*.

The great majority of FTD members operate exceedingly small businesses, with almost incredibly low *gross* annual sales.[2]

FTD conducts no business on its own behalf. Its principal function is to operate a clearinghouse which provides the mechanism by which its members can accept, transmit and fill intercity "wire" orders—*i.e.*, orders placed by a customer in one city for delivery of flowers by another florist in another city (P I 61, 65). Actual intercity transportation is precluded by the perishability of the product (P I 61-62).

The customer's payment for such an order is received by the local FTD member florist who sends the order for execution to a fellow FTD florist of his own choosing in the destination city (P I 62, 65). The customer's florist accounts to FTD for the payment he receives. The destination florist fills the orders from his own stock, in reliance upon the guaranty of the FTD clearinghouse that he will be paid (P I 65; RA 46). This is vitally important in an industry which is characteristically "undercapitalized" and suffers from "slow pay" (Tr. 416-417). FTD also guarantees that

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[2] As reported by the United States Department of Agriculture:

"The retail florist industry comprised of approximately 22,000 establishments *truly qualifies as an industry of small businesses.* The annual sales average for all U. S. florists is slightly over $50,000.

"*Nearly two-thirds of retail florists in the United States have annual gross sales below $50,000* . . . . Almost 10 percent of all florists have annual sales between $100,000 and $250,000 . . . . Less than 2 percent of all florists have sales of $250,000 or more; . . . (PROFILE OF THE RETAIL FLORIST INDUSTRY 1964, U. S. DEPARTMENT OF AGRICULTURE, ECONOMIC RESEARCH SERVICE, REPORT No. 741, at 4; emphasis supplied).

orders will be filled to the customer's satisfaction (P II 406).

FTD is supported by annual membership dues, plus advances of 5% on orders handled for members by its clearinghouse. Such advances are used to defray clearinghouse costs and the expense of advertising and promotional activities performed by FTD on behalf of all of its members. Unexpended portions of these advances are returned to the members *pro rata* (RA 46-47).[3]

Since the entry of the consent decree in 1956 (Pet. 4), FTD members have freely joined other wire service organizations and have freely cleared orders through their facilities (P II 406). The record shows, as follows, the growth of competing clearinghouse organizations and the number of FTD members with dual memberships (RX 91; DSA 29):

United States 1961-1964

	December 1961	September 1962	September 1963	July 1964
FTD	10,426	10,440	10,415	10,485
Teleflora	2,282	2,501	3,428	4,877
Dual FTD-Teleflora	369	505	900	1,648
Florafax	332	958	2,324	3,521
Dual FTD-Florafax	17	95	424	823

(b) Petitioner's Organization and Plan of Operation. Petitioner was founded in 1958 (Pet. 4), by Thomas J. O'Brien of Chicago, its president and principal stockholder. An FTD member since 1939, he is

[3] Each of the two florists participating in an FTD wire order pays 2% to support the organization's advertising and promotional activities. The destination florist pays another 1% which is used to cover the cost of administering the clearinghouse *(ibid)*.

one of the nation's largest florists with annual retail sales of $200,000 to $250,000 (P I 59-60, 62-63).

Petitioner was conceived as an organization restricted to a small clique of larger FTD members (RX 1, RA 62). They would comprise, in Mr. O'Brien's words, "the most exclusive club, as it were, in floristry" (RX 11, RA 71). They would be induced to pay petitioner substantial fees by the promise of greatly increased business. This would be achieved by a threefold program, involving preemption of the public's wire business by holding petitioner out to the public as respondent's long-established organization; limitation of petitioner's franchisees on an exclusive territorial basis; and the pursuit of exclusive reciprocal dealing among such franchisees. The exclusive franchisees' memberships in FTD would afford them access to its clearinghouse facilities and free petitioner of the burden of maintaining such facilities (P I 119-20).

The initial step was the choice of a name which admittedly simulated FTD and caused the public to misidentify petitioner as respondent. To quote petitioner's president (RX 11, RA 73; P I 154-55):

> "Our name is a great big mouthful to say. We did it purposely to begin with—we set it up as a network with a compound name specifically, so that we could divide it and by dividing it, qualify for two listings in the florist classification . . . . which we have already told you we give you.
>
> "The names, incidentally (*and not so incidentally*) are being recognized by users of the yellow pages as the principal florist inter-city order agent and that is the impression given to us by practically all callers that are using the service. *They just assume right off the bat when they read our name that we are the organization*

> . . . and this will prove to your benefit . . ." (Emphasis supplied).[4]

Petitioner traded on this confusion through the use of dual Yellow Page listings of its franchisees as "exclusive representative[s]." (P I 154; PX 4, 5, P III 10, 11). According to its president, "Yellow Page advertising"

> "is the most important form of advertising that can be done for the retail flower business and my entire business has been built and sustained on it, that is, I am referring to my retail flower business." (P I 86-87).

He emphasized that "the name of [his] corporation" were key words in his Yellow Page ads (P I 125).

Petitioner sold franchises, for annual fees averaging $300 to $320, and ranging as high as $725, on a "TRULY EXCLUSIVE", one-to-a-city basis (P I 72-73; RA 44; RX 1, RA 62). It conditioned the award of franchise on the continuation of "existing membership . . . in a wire-service organization" (RX 1, RA 62)—*i.e.,* FTD—thereby avoiding the burden of a separate clearinghouse (P I 119-20). To quote Mr. O'Brien (RX 11, RA 63-64; RX 23, RA 93; emphasis supplied)

> "Basically, we are (1) a sales organization. We are *not in the least like FTD*—we are not set up to be just another wire organization. Our services

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[4] Two of the first four words and three of the first four initials of petitioner's name—"FNTDN"—were identical with respondent's—"FTD." Other flowers-by-wire organizations used distinctive names—e.g., Teleflora Delivery Service ("TDS") and Florafax (RX 91, DSA 29; P I 117-18).

go far and beyond those services provided by the FTD and TDS.[5]

> "As you know, they were set up initially to provide a clearing house function and *the FTD particularly is doing an admirable job of it, and we see no reason to begin to duplicate in that field.*"
>
> * * *
>
> "*All these stores* [FNTDN franchisees] *are members of FTD* and as such have their own fine clearing house which we do not duplicate: because under these circumstances such duplication of service would be wasteful."[6]

It was repeatedly proclaimed that petitioner contemplated a boycott of other FTD members. An early letter to one of petitioner's franchisees declared (RX 13, RA 83):

> "Enclosed is a preliminary list of those florists who like yourself have been admitted to membership in FNTDN.
>
> "One of our purposes of course is to increase the transfer of wire orders among our selected members and therefore it is recommended that you show favoritism to these companies when sending orders in to their territories. They, likewise, will give your company the same consideration when sending orders into your area."

Mr. O'Brien also testified that he urged exclusive-dealing among petitioner's members "for the whole

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[5] TDS was a private profit corporation with its own clearing-house to process wire orders (P I 115-17).

[6] These pre-litigation admissions belie petitioner's belated claim that it was prevented by respondent from establishing a clearing-house (Pet. 5 n. 5). Other wire organizations had no such difficulty. See p. 4, *supra*; P I 117-20.

rest of the time I was in business, . . . every time I had the chance. . . . Of course I did." (P I 164). The monthly membership lists he sent to petitioner's franchise holders were accompanied by admonitions to practice exclusive reciprocal dealing, such as the following (RX 17, RA 89-90):

> "Are you faithfully sending your 'outgoing' [wire orders] to your fellow FNTDN members in their towns? Full co-operation is necessary.
>
> "This list is 'THE BIBLE' in my store. My employees have to look here first—and if there's an FNTDN member in the town—he gets the order. We make no exceptions to this rule.

On another occasion Mr. O'Brien sent the following directive to each member:

> ". . . be sure to explain the purpose of this preferred list to your employees and *be sure they use it* in sending orders to other cities, just like all the other FNTDN members are doing." (RX 15, RA 86; emphasis supplied).[7]

Mr. O'Brien admitted, as follows, petitioner's purpose to capture the "cream" of the wire order business for its franchisees—at the expense of other FTD members (RX 11, RA 71-72):

> "We are taking one key florist in each town throughout the whole country . . . [T]his means that you have a list of the finest florists throughout the country—and they also have YOUR name

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[7] In another "confidential" memorandum Mr. O'Brien directed his franchisees

> "Remember to favor your fellow FNTDN member with your outgoing orders—Be sure your employees are using your preferred membership list." (RX 19, RA 92).

> in your town. So you become the prime objective of orders from what we expect to be somewhere between a thousand and fifteen hundred of our exclusive Representative Florists all over the country. *Obviously this is going to skim the cream right smack off the top of all the inter-city business in the country.*" (Emphasis supplied).

Petitioner's "Prospectus" to potential members proclaimed "astounding" success in that endeavor, stating (RX 1, RA 61):

> ". . . Our monthly copyrighted membership list which is sent to every member accomplishes all these things. It is a preferred list of the better florists, available only for the exclusive use of our members. It also makes each man in his town the *principal target for orders from fellow FNTDN members in all the other cities;*[8] while at the same time, he continues to receive his usual share of all the wire orders from other florists who send about 75% of their outgoing on a 'blind, guesswork' basis. Remember, we select just one outstanding florist in each town, and that makes the chosen shop a member of the most select group of florists in the world. *Via this activity we are accomplishing astounding increases in incoming wire business for our members, some of them reporting gains from 25% to 60% more than they were receiving before their affiliation with us.*"[9]

The adoption of the Rules after Department of Justice Clearance: Respondent's only action of which

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[8] Emphasis in original.

[9] Emphasis supplied.

petitioner complains was the adoption, in July 1961, of the two rules in issue in this case (Pet. 7). These rules provided (*ibid.*):

> "No Active Member shall permit the publication of his shop name as a part of any list or directory of FTD florists a purpose of which is to encourage or influence Active Members appearing on said list or in said directory to exchange orders between themselves to the exclusion of other Active Members of FTD."; and
>
> "No Active Member shall advertise or hold out to the public in any manner with respect to flowers-by-wire orders that he offers an exclusive flowers-by-wire service, when other FTD members offer FTD service in the same area."

The text of these rules contains no prohibition against affiliation with or participation in petitioner's organization or any other. They permit listing in any directory of FTD members which does not promote a boycott of other FTD members. Additionally, the rules merely proscribe false advertising of an exclusive wire service, when other FTD members in the same area also provide such service.

In a sworn answer to an interrogatory, petitioner affirmed:

> "Plaintiff knows of no instances where FTD members refused to deal with or denied FTD services to FTD members who were members of plaintiff." (RA 49).

At trial Mr. O'Brien testified that the services of the FTD clearinghouse were available to his franchisees (P I 119).

On April 24, 1961 before the rules in issue were adopted, FTD's counsel submitted them to the Department of Justice for clearance. This submission was made in a five-page letter to Assistant Attorney General Loevinger, fully disclosing their background (RX 61, P III 78-82). Among other things, the letter stated (P III at 80):

> "... At the instance in one case of an FTD member and in other cases at the instance of persons outside FTD there have been formed or are proposed to be formed, groups of FTD members who are purportedly given 'exclusive franchises' within particular cities or areas. One obvious purpose of such groups is to limit the exchange of FTD orders between the franchised areas to members of the intramural group, to the exclusion of other FTD members in the area. One other purpose, obviously, is to profit the sponsor of the intramural group, who sells the 'exclusive franchise.'
>
> "... The Association itself suffers no loss of revenue, so its concern is not financial. Rather it is disturbed by the divisive consequences of this discrimination by some members against the others."

After setting out the full text of the rules (*id.* at 81), the letter then requested their clearance, as follows (*id.* at 82):

> "We hope that your department will agree with us that the proposed rules do not in any way conflict with the terms of the Final Judgment of June 1, 1956, *and that they are not contrary to any of the various statutes which you administer and enforce.*" (Emphasis supplied).

Six months later, on June 19, 1961 these same rules were cleared without qualification. The clearance from the Antitrust Division read (RX 62, P III 83):

> "In reply, I wish to advise you that the Antitrust Division of the Department of Justice *has no objection* to the proposed additions at the end of Membership Rules 1 and 3 or to the proposed addition of new Membership Rule 16. *Further,* the Division will take no action under the Final Judgment in opposition to said proposed amendments." (Emphasis supplied).

Later, in 1961, a mistaken interpretation of the rules was inadvertently sent to three FTD members. This led to a series of communications with the Department of Justice. These are reproduced in full in Respondent's Supplemental Appendix in the Court of Appeals (incorporated in its Reply Brief below as "DSA 1" *et seq.*). The upshot was that the Antitrust Division, on this occasion by Assistant Attorney General Orrick, reaffirmed its prior clearance—this time expressly approving FTD's circulation of the following interpretations of the rules (RX 79, Attachment 2, RX 80, DSA 16-18, emphasis supplied):

> "Interpretation: The names of FTD members or their shops may be listed in private or public directories in connection with their membership in organizations other than FTD. However, the FTD member may not permit publication of his name or shop name in a list or directory of FTD members, *a purpose of which directory is to encourage or influence such members to deal with each other through FTD facilities to the exclusion of other FTD members.*
>
> * * *

"Interpretation: FTD members may advertise their unique services which exceed or are different from those required by FTD membership. *However, in a town or locality where there are two or more FTD members, no FTD member may advertise his service as the exclusive flowers by wire service.*" [10] (Emphasis supplied).

The Jury Instructions and Verdict: The jury instructions comprehensively set forth petitioner's theory of its claims—quoting the allegations of the complaint at length *in haec verba.*[11] As the court below noted,

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[10] It is true that the Department of Justice filed a memorandum below (Pet., 9 n. 8). Rather than comment on it, we incorporate our response as an Appendix to this Brief. See pp. 1a-3a, *infra.*

It is also true that the Department of Justice has filed a civil complaint against respondent (Pet. 9-10 n. 8). That complaint does not mention petitioner and its charges are unrelated to this case. The above-quoted clearances expressly covered the rules here at issue. That case has not been tried. Respondent has denied all allegations of unlawful conduct and will contest it. By its reference to that case, petitioner would prejudice respondent in this one.

[11] These were the quotations in full text (P II 458-60, inclusive):

"Now, the complaint in this matter insofar as it need be read at this time to you provides and charges that:

" 'For many years last past and continuing to the present date the defendant FTD and its co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in flowers-by-wire orders and to monopolize or attempt to monopolize for defendant FTD the hereinbefore described trade and commerce in render' g flowers-by-wire orders service to retail florists in violation of the sections of the Acts of Congress,'

"—which I shall read to you later.

" '—the said combination and conspiracy charged has consisted of a continuing agreement, understanding and concert of action by defendant FTD, its co-conspirators and others to plaintiff unknown, the substantial terms of which have

the jury received "no admonition that these allegations were mere accusations, not evidence." (371 F. 2d 263 at 270).

The instructions given said nothing whatever to the jury about possible consideration of the evidence of

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been and are to cause FTD subscribing florists to cease and to refrain from doing business with and from using the flowers-by-wire order services and facilities provided by the plaintiff in order to eliminate plaintiff as a competitor and to destroy its business.

" 'For the purpose of carrying out the aforesaid combination and conspiracy defendant FTD,'

"—it is charged,

" '—together with its co-conspirators and others to plaintiff unknown have undertaken and done the things that they have combined and conspired to do and, among other things, they have,'

"it is alleged,

" '—(a) adopted, promulgated and threatened enforcement of an FTD membership rule, violation of which subjected the offending subscriber florist to suspension or revocation of his FTD membership, which rule was designed and intended to prevent FTD members, who also were subscribing florists of plaintiff, from advertising in the Yellow Pages of phone directories, or elsewhere their affiliation, exclusive or otherwise, with the plaintiff.

" '(b) Adopted, promulgated and threatened enforcement of an FTD membership rule, violation of which subjected the offending subscriber florist to suspension or revocation of FTD membership, designed and intended to prevent FTD members who were also subscribing florists of plaintiff from listing in plaintiff's membership directory and,

" '(c) advised FTD members that they may be subject to boycott or disciplinary action in the event such members became or continued as subscribing florists of plaintiff and otherwise acted to prevent and discourage FTD members from utilizing the services and facilities provided by the plaintiff.' "

petitioner's activities underlying the defense theory that the rules were reasonable and lawful in the circumstances surrounding their adoption. The trial court uniformly rejected every one of respondent's requested instructions—Nos. 18, 29, 29A[12]—which contained any specific or general reference to such evidence.

None of these rejected requests mentioned "unclean hands" or claimed that respondent was immune from liability, regardless of its conduct, if petitioner was guilty of misconduct. Their sole thrust was to obtain jury consideration of the defense theory that the rules were reasonable and lawful.

Request 18 reviewed respondent's analysis of the evidence supporting its position that the rules were reasonable. This was interspersed by repeated declarations that the analysis represented views of the evidence which respondent "claims," "alleges," or "asserts." It concluded as follows (Pet. 12, n. 13):

> "Defendant *asserts* that it acted at all times in good faith and took every *reasonable* precaution to assure the legality of its actions." (Emphasis supplied).

Request 29 was a limited version of 18. It would have authorized the jury to "consider" whether respondent, "in good faith, believed"[13] that petitioner was promoting a boycott of other FTD members and deceptive public advertising of an exclusive wire order service

> "[i]n considering whether these rules were specifically intended to drive the plaintiff out of business

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[12] Pet. 11-12 n. 13.

[13] This language reflects *Board of Trade of the City of Chicago* v. *United States*, 246 U.S. 231, 238 (1918). See p. 20 *infra*.

> or were intended to be only a *reasonable* means to protect interstate trade and commerce in flowers-by-wire orders from destructive and injurious practices." (Pet. 12 n. 13; emphasis supplied).

Request 29A was general in form and would simply have permitted the jury, in deciding whether the challenged rules were "reasonable" to

> "consider all of the surrounding facts and circumstances of which FTD had knowledge or which FTD reasonably believed to exist." (*ibid.*)

The lengthy charge contained only a brief, abstract and confusing instruction about the possibility of defense (P II 467). This first said the

> "rules on their face, do not constitute unreasonable restraints of trade, regardless of [their] effect . . . upon the plaintiff."

But it then declared that trade associations

> "may not adopt means to protect themselves . . . from practices of competitors which are destructive and injurious, when the purpose *or direct affect (sic) thereof* is to force competitors out of business." (Emphasis supplied).[14]

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[14] In full text, this instruction said *(ibid.)*:

> "The adoption and publication of the three membership rules in and of themselves, and those rules on their face, do not constitute unreasonable restraints of trade, regardless of what effect such adoption and publication, standing alone, might have had upon the plaintiff.
>
> "However, if the rules were adopted and published with the specific intent of destroying plaintiff's business, then that intent would convert the adoption and publication from lawful to unlawful acts. Trade associations may not adopt means to protect themselves and protect their interstate trade and commerce from practices of competitors which are destructive

This instruction excluded consideration of petitioner's "destructive and injurious" practices. It also restated, as law, the complaint's allegation—previously read to the jury as part of the charge—that respondent had adopted the rules "in order to eliminate plaintiff as a competitor and to destroy its business" (p. 14, n. 11, *supra;* P II 459).

Under such instructions the jury returned a verdict for petitioner, amounting to trebled damages of $450,000 (Pet. 3).

The Injunction Decision: The trial court, having heard the evidence, denied injunctive relief. He found that plaintiff had deliberately formulated and carried out a plan—dependent upon access to respondent's clearinghouse—which "utilized yellow page advertising listings" to deceive the public and "was a boycott against the members of Defendant's Association who were not affiliates of Plaintiff" (Pet., App. B, 38-40). His conclusion was as follows (*id.* at 39):

> "The rules adopted by Defendant Association were not such a restraint upon the activities of Plaintiff as to justify injunctive relief, but rather were measures designed in good faith to preserve and promote fair competition within the same general industry, while protecting the integrity of its own service for the benefit of its own members."

The Decision of the Court of Appeals: The court below reversed the jury verdict on the sole ground that

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and injurious, when the purpose or direct affect (sic) thereof is to force competitors out of business. At the same time, the antitrust laws do not prevent trade associations from adopting reasonable rules and regulations to protect their interstate trade and commerce from destructive and injurious practices of competitors when the purpose is to promote competition upon a sound basis."

respondent had been denied jury instructions concerning the theory of its defense. To quote the court (371 F. 2d 263 at 270).

> "A party is entitled to instructions presenting his theory of the case if there is evidence to support it. *Allers* v. *Bohmker,* 7 Cir., 199 F. 2d 790 . . . This would appear to be particularly so in the instant case where in contrast to the court's silence on the defendant's theory of defense it did give instructions which had the effect of fully covering the plaintiff's theory of liability and read pertinent extracts from the plaintiff's complaint to the jury, and although the court prefaced or interspersed them with the characterization 'it is alleged' or 'it is charged' it gave no admonition that these allegations were mere accusations, not evidence.
>
> "On the damage claim phase of the appeals we conclude that, on the facts and circumstances here presented, the court's refusal and failure to instruct the jury on FTD's theory of defense constitutes prejudicial error which requires reversal of the judgment for damages and a remand to the District Court for a new trial.

The court likewise reversed the judgment denying an injunction, on "res judicata and collateral estoppel" grounds, as follows (*id.* at 270-71):

> "FNTDN's complaint combined claims for damages and injunctive relief. In such case a trial of either claim before the other raises a collateral estoppel to the relitigation of those issues essential to the decision which are common to both claims and are decided in connection with the claim tried first. . . .
>
> "FNTDN having demanded a jury trial it was mandatory that the treble damages claim be tried and disposed of before consideration of the equit-

able claim for injunctive relief. The issue of the alleged violation of the Sherman Act was common to both claims. And to proceed otherwise might, through operation 'either by way of res judicata or collateral estoppel' deprive FNTDN of its right to a jury trial on its treble damages claim. *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500."

The Court remanded the case for a new trial on both the damage and the injunction issues, stating (*id.* at 271):

"Thus, although our reversal and remand for a new trial voids the jury's verdict, and FTD is entitled to a new trial on the damages claim made against it, FNTDN, under the circumstances is entitled to a redetermination of its claim for injunctive relief subject, of course, to any estoppel which on retrial may flow from the jury's determination of the issues which are common to both claims." [15]

REASONS FOR DENYING THE WRIT

1. *There is no question of general importance; only the limited issue of the proper jury instructions on the evidence in this particular case.* The decision below held that the trial "court's refusal and failure to instruct the jury on FTD's theory of defense constitutes prejudicial error." (371 F. 2d 263 at 270). In so holding the court perceived that respondent had been improperly denied jury consideration of the legality of its rules under the governing standards prescribed by this Court. Those standards dictated appraisal of the purpose and nature of the rules in light of all the sur-

[15] Respondent intends to file a conditional cross-petition for a writ of certiorari from the reversal of the injunction judgment below and has been granted until April 10, 1967 to do so.

rounding circumstances, under the "rule of reason" doctrine taught by a long line of decisions from *Board of Trade of the City of Chicago* v. *United States,* 246 U.S. 231, 238 (1918) through *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 623 (1953), and *White Motor Co.* v. *United States,* 372 U.S. 253, 261 (1963).

Respondent's refused instructions—tailored along the classic lines of *Board of Trade, supra*—were designed solely to permit jury evaluation of the reasonableness of respondent's rules in light of the circumstances leading to their adoption.[16] Each left the jury free to determine the reasonableness issue against respondent, even if it found that respondent's rules were a defensive response to petitioner's aggressions.

As the court below concluded, the refusal of such instructions foreclosed jury evaluation of undeniably "relevant facts," contrary to the time-honored mandate of this Court—originally pronounced in *Board of Trade, supra,* 246 U.S. at 238, and reaffirmed in *White Motor, supra,* 372 U.S. at 261—which declares:

> "The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, *are all relevant facts.*" (Emphasis supplied).[17]

The result exposed respondent to jury consideration of its rules in a vacuum, independently of petitioner's previously implemented program—of boycott and misrepresentation—to subvert respondent's facilities for the advantage of its small clique of FTD mem-

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[16] Pet. 11-12 n. 13; see pp. 15-16, *supra.*

[17] 371 F. 2d 263 at 268.

bers, through an "inside" operation grounded on their access to the FTD clearinghouse and its guaranty of accounts. Correlatively, petitioner was allowed to pose before the jury as an innocent bystander, victimized by rules unrelated to its premeditated assault on other FTD members.[18]

There is no authority which dictates such blindfolding of a jury.

2. *There is no conflict with decisions of this Court.* Petitioner is misguided in its reliance upon *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,* 340 U.S. 211 (1951), and other authorities holding that a defendant guilty of violating the antitrust laws cannot escape liability by pointing to petitioner's misconduct.

Contrary to petitioner's claim, respondent's requested instructions in no manner "detailed defendant's 'unclean hands' theory of defense" (Pet. 11). None of the requests mentioned "unclean hands." None sought a charge that "illegal conduct of petitioner" would "legalize," respondent's conduct or "im-

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[18] The prejudice to respondent was accentuated—not ameliorated—by the lone instruction recognizing any possibility of defense. See pp. 16-17, *supra*. The charge was the last thing heard by the jury. It was doubly injurious to respondent. First, the totally abstract quality of the single "defense" instruction necessarily conveyed the impression that respondent's preceding evidence and arguments concerning petitioner's conduct were meaningless—particularly in light of the lengthy quotations from the complaint. See pp. 13-14 n. 10, *supra*.

Next, the charge was contradictory. In one breath it declared that the rules were not "on their face . . . unreasonable restraints . . . regardless of [their] effect . . . upon the plaintiff." In the next breath it said that even if adopted as protection from "destructive" practices, the rules were bad if the "purpose *or direct affect* (sic) *thereof* was to force competitors out of business." (Emphasis supplied). See pp. 16-17, *supra*.

munize [it] against liability." *Kiefer-Stewart, supra,* 340 U.S. at 214. (See Pet. 11-12, n. 13).

Petitioner—not respondent—has consistently raised the "unclean hands" concept in this case. By repeated and distorted invocation of *Kiefer-Stewart*—as a sword for a plaintiff—petitioner has persistently attempted to foreclose any consideration of its antecedent conduct by the jury, the trial court, the Court of Appeals [19] and by this Court [20] in adjudicating the reasonableness of the challenged rules. Respondent's appeal from the jury verdict was based solely on the erroneous refusal of all of its requested jury instructions on the defense theory that the rules were reasonable and lawful (ROB 30-37).[21]

The content of the rules, moreover, undercuts petitioner's reliance on cases rejecting a plaintiff's misconduct as a ground for immunizing antitrust defendants. Each such case reached this Court on a record

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[19] At the trial stage petitioner successfully used this technique to beat off every requested instruction containing any mention of its conduct (Tr. 2504-07). At the appellate stage, petitioner first cited *Kiefer-Stewart* in support of its claim that the trial court improperly considered its activities in deciding that respondent's rules were reasonable and therefore denying injunctive relief (POB 49). Petitioner then used the case again in its answer brief to the appeal from the jury verdict, to support the argument that the refused instructions were improper because they mentioned its conduct (PAB 24).

[20] Compare footnote 1 at page 3 of the Petition with the full text of the purportedly quoted section of the opinion. 371 F. 2d 263 at 267.

[21] Under the briefing sequence ordered by the court below, petitioner filed the first brief, appealing from the denial of injunction (POB), and respondent the second brief, appealing from the jury verdict and answering petitioner's first brief on the injunction appeal (ROB).

establishing a *per se* antitrust violation by the defendant. There was price-fixing in *Kiefer-Stewart, supra;* boycott in *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U.S. 457 (1941); and price discrimination, specifically prohibited by the Robinson-Patman Act, in *Moore* v. *Mead Service Co.,* 340 U.S. 944 (1951), on remand 190 F. 2d 540 (10th Cir. 1951), cert. denied 342 U.S. 902 (1952).[22]

In contrast, this case involves two rules which are not *per se* antitrust violations under judicial precedent or forbidden by specific statutory mandate. This is self-evident from their clearance—both before and after promulgation—by the Antitrust Division of the Department of Justice, acting with full knowledge of their background and purpose. See pp. 11-12, *supra.* The sum and substance of these rules were simply anti-boycott and honest advertising specifications.[23]

Nothing in the rules prevented any FTD member from joining petitioner's organization or any other, or from participating in their activities. They did not prohibit service to petitioner's members.[24] They allowed FTD members to be listed in petitioner's direc-

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[22] Petitioner itself recognized that a *per se* violation was crucial to these decisions. In its original brief below—appealing from the injunction judgment—petitioner made no suggestion that respondent's rules were *per se* illegal (POB 49). But in its answer to respondent's appeal from the jury verdict, it was compulsively driven to the following primary argument: "THE EVIDENCE ESTABLISHED A PER SE ANTITRUST VIOLATION" (PAB 16).

[23] The full text of the rules appears at p. 10, *supra.*

[24] The trial court found that no FTD member was ever disciplined for joining petitioner (Pet App. B, p. 33, ¶ 4). Petitioner has never suggested otherwise. (POB 56-57). Petitioner admitted that no order between its members had ever been denied the service of respondent's clearinghouse. See p. 10, *supra.*

tory if it abjured promotion of a boycott of other FTD members. Their only other prescription was a ban against deceptive advertising of an exclusive service—applicable to all FTD members, whether or not they belonged to petitioner's organization.

3. *There is no conflict of Circuits.* The decision below involves no conflict with other Circuits. It followed the most closely parallel Court of Appeals case. *Union Leader Corporation* v. *Newspapers of New England, Inc.*, 284 F. 2d 582 (1st Cir. 1960), cert. denied, 365 U.S. 833 (1961), rehearing denied, 365 U.S. 890 (1961). As the Court below perceived (371 F. 2d 263 at 267-68), that case squarely rejected, as follows, the same propositions pressed by this petitioner (284 F. 2d at 586-87):

> "In calling [defendant's conduct] an 'unfair practice' *the court assumed the point.* For, as we conceive the issue, the practice was 'unfair' if conducted with an intent to monopolize, but it was fair if it was intended only to resist deterioration of its own position brought about by Union Leader's unlawful activities." (Emphasis supplied).
>
> "It is now clear that a plaintiff's own antitrust violations do not bar its successful maintenance of a private anti-trust action. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 1951, 340 U.S. 211, 71 S. Ct. 259, 95 L.Ed. 219, rehearing denied 340 U.S. 939, 71 S. Ct. 487, 95 L.Ed. 678; *Moore* v. *Mead Service Co.*, 10 Cir., 1951, 190 F. 2d 540, certiorari denied 342 U.S. 902, 72 S. Ct. 290, 96 L.Ed. 675. Nor can the use of unfair methods by a competitor automatically justify adopting comparable unfair methods. *F.T.C.* v. *A. E. Staley Mfg. Co.*, 1945, 324 U.S. 746, 753, 65 S. Ct. 971, 89 L.Ed. 1338. However, *it does not necessarily follow that a competitor's violations cannot constitute a cir-*

> *cumstance to be considered in determining whether the defendant's conduct was in fact a violation.* (Emphasis supplied).

Union Leader expressly followed this Court's teaching in *Times-Picayune Publishing Company* v. *United States,* 345 U.S. 594, 623 (1953).[25] The Courts of Appeals in this case and in *Union Leader* are in strict accord. The net of the decision below is that respondent was entitled to instructions allowing evidence of petitioner's abuse of respondent's membership and facilities

> "to be considered in determining whether the defendant's conduct was in fact a violation." (*Union Leader, supra,* at 586).

The Petition presents no issues of such a kind warranting review by this Court.[26]

4. *There are no circumstances warranting this Court's interlocutory consideration of the case, "contrary to its usual practice." Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 153 (1964).[27] The plea for interlocutory consideration asks peremptory denial by this Court of respondent's right to a jury trial on proper instructions. Petitioner admits that respondent was not responsible for the trial delays (Pet. 18 n. 17). Respondent is a non-profit corporation serving

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[25] 284 F. 2d at 587.

[26] The present petition rests on the identical grounds and authorities unsuccessfully urged in support of a writ in *Union Leader*. Compare Petition No. 658, October Term, 1960, at pp. 15-18, with the present petition at pp. 13-15.

[27] See also, *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257-58 (1916); *American Construction Company* v. *Jacksonville T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893).

a membership overwhelmingly composed of far smaller businessmen than petitioner's president. See p. 3 n. 2, pp. 4-5, *supra*. They can ill afford the huge verdict erroneously entered below.

A second trial will be properly submitted to the jury under respondent's requested instructions which simply seek an adjudication of the case under the applicable "rule of reason" standards.[28]

CONCLUSION

For the foregoing reasons the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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[28] Petitioner is misguided in its invocation of *United States* v. *General Motors Corporation*, 323 U.S. 373 (1945). That case involved the litigation of a novel question for which there was no trial guideline. To quote the Court (*id.*, at 374):

> "This case is one of first impression in this court. It presents a question on which the decisions of federal courts are in conflict."